Petition

81-372

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

ALAN J. WHITE,
Petitioner,

vs.

OFFICE OF PERSONNEL MANAGEMENT

and

MARVIN H. MORSE, as Director,
Office of Administrative Law
Judges,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALAN J. WHITE
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Potomac, MD 20854

Petitioner,
in propria persona

QUESTIONS PRESENTED

1. Whether an exercise of the Court's power of supervision is appropriate when a lower federal court (a) grants a motion to dismiss a Complaint without accepting material allegations of fact in the Complaint as being true, and (b) similarly departs in other ways from the accepted and usual norms of judicial proceedings.

2. Whether an agency that controls the entrance to a type of federal professional employment, and compiles materials to determine an applicant's eligibility to enter that profession, and is asked by the applicant under the Privacy Act of 1974 for access to those materials, may withhold part of them under the authority of Subsection (k)(5) of that Act, or

whether the application of that limited statutory authority to withhold materials would infringe "liberty" and "property" interests associated with the applicant's entrance to the profession that are protected by the Constitution under the Roth/Sinderman doctrine. */

*/ Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972).

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

ALAN J. WHITE, Petitioner,	:	
v.	:	
OFFICE OF PERSONNEL MANAGEMENT	:	
and	:	No.
MARVIN H. MORSE, as Director, Office of Administrative Law Judges, Respondents.	:	

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Alan J. White, in propria persona, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals) entered in this proceeding on June 29, 1981, together with the orders of the

Court of Appeals entered on July 29, 1981, denying rehearing and rehearing en banc.

OPINIONS BELOW

The orders of the Court of Appeals (1a and 2a), the judgment of the Court of Appeals (3a-4a) and the orders of the United States District Court for the District of Columbia (District Court) (5a-6a and 7a-12a) are not reported.

JURISDICTION

The judgment of the Court of Appeals (3a-4a) was entered on June 29, 1981, and orders denying a timely petition for rehearing and suggestion for rehearing en banc were entered on July 29, 1981 (1a and 2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Amendment V to the Constitution provides, in pertinent part,

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Pertinent parts of Sections (a)(4)(B), (a)(6)(A) and (a)(6)(C) of the Freedom of Information Act, 5 U.S.C. § 552, are set forth in the Appendix at 13a; pertinent parts of Sections (d), (g) and (k), and Section (q), of the Privacy Act of 1974, 5 U.S.C. § 552a, are set forth at 14a-15a; and pertinent parts of the Office of Personnel Management's Regulations Under the Privacy Act of 1974, 5 CFR § 297, are set forth at 16a-17a.

STATEMENT OF THE CASE

Approximately ten years ago, in July 1971, the petitioner, Alan J. White (White),

joined a corps of six other attorneys to prepare opinions for the Federal Power Commission (FPC), which is now the Federal Energy Regulatory Commission (FERC). In the years that followed, two of those attorneys retired, one accepted a higher position elsewhere, and the other three were promoted to administrative law judge (ALJ) positions within the FPC.

One can be promoted to an ALJ position only if selected from a certificate prepared from a register that is established and maintained by the Office of Administrative Law Judges (OALJ) of the Office of Personnel Management (OPM), which is part of the former United States Civil Service Commission (CSC). Accordingly, the OALJ controls the entrance to the ALJ profession throughout the federal government, paralleling the function of the boards of examiners that control the

entrance to the legal profession throughout the states.

In January 1975, White applied to the OALJ to become listed on a register so that he could be considered for promotion to an ALJ position, as were his predecessor peers. But he was later informed that his score was insufficient, and was rated ineligible. White applied again in January 1976, and was again rated ineligible for the same reason.

Believing that his ineligible ratings were the result of false charges that were filed against him in 1974, White sought two administrative actions. He asked the CSC for access to his entire application record, which was granted in part, and to change that record in certain respects, which was denied. And he asked for review of the 1976 rating action, which took 20 months and resulted in no

change. As part of the request for review, White asked for a confrontory hearing, which was denied.

The administrative appeal of White's request to change his application record ripened first, and in February 1977 White filed a lawsuit to challenge that record (1) to cause the administrative review of the 1976 rating action, which was still pending, to consider a changed and corrected record, and (2) to obtain money damages. The District Court stayed White's request for discovery, including his request for access to his entire application record 1/, and dismissed the lawsuit. White appealed that dismissal, and shortly thereafter the administrative review of the 1976 rating action ripened.

1/ White planned to seek a complete copy of his application record through discovery and, therefore, he did not sue for access.

The Court of Appeals rejected all of the District Court's grounds for dismissal, but affirmed the dismissal on the new ground that White sued prematurely, and that judicial review of White's request to change his application record, and of the 1976 rating action on that record, should proceed concurrently. White did not agree and petitioned for certiorari, but his petition was denied.

In the second round of litigation, White sought to profit from the first round by filing two lawsuits. The one lawsuit consisted of the Complaint that was approved by the Court of Appeals as against the challenges that were made in the first round of litigation; White simply enlarged the Complaint to obtain review of the 1976 rating action, as the Court of Appeals said he should do, at 589 F.2d 713. And the other lawsuit --

this proceeding -- was filed under the Freedom of Information Act (FOIA), the Privacy Act of 1974 (PA) and the Declaratory Judgments Act to obtain access to the application record that was needed for the first lawsuit, and to prevent the District Court from again cutting White off from discovery of that record.

Because of the time that elapsed in the first round of litigation, the two-year statute of limitations within the PA expired with respect to White's prior request for access to his application record. Therefore, White wrote to the OALJ on June 15, 1979, as follows (emphasis added):

> . . . I request under the Freedom of Information Act and the Privacy Act of 1974 that my entire application record be made available to me in conjunction with my preparation of a new application for an administrative law judge rating.

On July 10, 1979, Joyce L. Evans (Evans), who was then Acting Director of the OALJ,

replied out-of-time, as follows (emphasis added):

> This is in response to your letter of June 15, 1979, requesting that your entire application file be made available to you under the Freedom of Information Act.
>
> If you wish a copy of your file to be sent to you, please forward your check, payable to the Office of Personnel Management, in the amount of $200.00 to cover the cost of reproduction at 10¢ per page.
>
> In view of the cost involved, you may wish to review your file in our office instead. If this is your preference, please contact my secretary, Joyce Harrell, at 632-4604 to arrange a convenient time for you to review the file.

White thereafter arranged to review his application record of approximately 2,000 pages on July 23, 1979. But, when he appeared at the offices of the OALJ, he was permitted to go through the contents of a corregated cardboard carton that contained part, and not all, of his application record. That refusal to provide access to the entire application

record led to further correspondence, the production of a few more pages of that record, and this lawsuit.

The Complaint of this lawsuit is divided into three Counts. Count I invokes the FOIA and alleges (1) that Evans' letter of July 10, 1979, granted White's request for access to his entire application record, (2) that parts of the record were not made available to him and were being withheld wrongfully, and (3) that as a matter of law the entire record was required to be made available in the light of 5 U.S.C. § 552(a)(6)(C), which provides (emphasis added):

> . . . Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. . . .

The OPM admitted that it was withholding part of the application record from White, but denied that Evans granted White's

request.

Count II invokes the right to de novo judicial review contained in the PA. Tracking pertinent language of the PA, it states, simply, that the OPM has refused to permit White to review the entire record, which the OPM admits, and that the OPM is improperly withholding agency records, which the OPM denies.

And Count III invokes the Declaratory Judgments Act, requesting a declaration of the unconstitutionality or the unconstitutional application of Subsection (k)(5) of the PA.

REASONS FOR GRANTING THE WRIT

1. The Exercise of Supervision Question

This part of the petition will show that the District Court departed so far from the accepted and usual course of judicial proceedings, and that the Court

of Appeals sanctioned the departure so far, as to call for an exercise of this Court's power of supervision.

White attached to the Complaint copies of his request for access and Evans' reply, the texts of which are set out at 8 and 9. Although the OPM formally denied that Evans granted White's request, the OPM also admitted that the particular attachment (Evans' reply) was a "complete and accurate statement" of her reply. Accordingly, White moved for partial judgment on the pleadings on the ground that the OPM admitted the completeness and accuracy of both of those attachments to the Complaint, and that the only possible conclusion was that Evans granted White's request. In addition to the fact that her reply says that White could purchase a copy of, or come in and see, his application record, her reply could

not have been an adverse determination because (1) it does not describe materials claimed to be exempt from disclosure, as is required by the OPM's regulations at 5 CFR § 297.303(c)(1) and (2) (at 16a-17a), and (2) it does not advise White of a right to appeal, as is required by the FOIA at 5 U.S.C. § 552(a)(6)(A)(i) (at 13a) in the case of adverse determinations. 2/

2/ The OPM refrained from saying what was intended by Evans' reply until White challenged in his brief to the Court of Appeals that "perhaps the OPM would like to state in its responsive brief what action was intended on July 10, 1979, and explain its rationale." And the OPM responded that Evans' reply "merely states the terms under which access will be given".

Since a statement of the terms of access would be meaningless unless the reply also granted access, the OPM has conceded in the obscured inclusive phrase that the reply says that "access will be given". The Court should observe, in this connection, that Evans' reply is the notification that is specifically
(Footnote continued on next page.)

The OPM countered with a motion to dismiss that violated the Federal Rules of Civil Procedure at least insofar as it did not state any reasons for dismissing the Complaint. But the District Court denied White's motion to strike the OPM's motion to dismiss, denied White's motion for partial judgment on the pleadings, and granted the OPM's motion to dismiss, giving its own reasons for such actions.

Notwithstanding that the OPM admitted several times in the Answer to the Complaint that White was given access to only part of his application record 3/, the

2/ (Continuation of footnote.)

required by 5 U.S.C. § 552(a)(6)(A)(i) (at 13a) of a prior determination to comply or not to comply with a request for access. In this case, Evans said that the OALJ would comply with White's request of June 15, 1979.

3/ For example, White alleged in paragraph 22, among other matters, that the OPM
(Footnote continued on next page.)

District Court found (at 8a) that the "OPM has granted access to the files . . . of Plaintiff. . . ." And notwithstanding that an attachment to the Complaint clearly states, "I have never been furnished full - censored copies of the Springer, Lewnes and McGowan evaluations of me," and that White moved formally for a finding to that effect, the District Court found (at 8a) that the "OPM has granted access to . . . all of the evaluations of Plaintiff it received. . .", and similarly denied the motion for the finding (at 6a). While space precludes an enumeration of all of the documents now known by White to have been withheld from him, the examples illustrate that

3/ (Continuation of footnote.)

was improperly withholding agency records from him. The OPM denied the allegation "except to admit that parts of plaintiff's record were not disclosed to him."

the District Court simply closed its eyes to claimed and admitted facts. 4/

Perhaps the most egregious aspect of the District Court's order, and the Court of Appeals' sanction of that order, is the failure to accept the allegations of fact in the Complaint as being true for the purpose of considering the OPM's motion to dismiss. Assuming arguendo (and contrary to White's position) that a court could conclude that Evans did not grant White's request, it is the accepted and usual course of judicial proceedings that a Court of Appeals must accept the

4/ For example, White's motion for partial judgment on the pleadings sought a translation into English of notes believed to be in short-hand, as is required by the phrase "in a form comprehensible to him" in 5 U.S.C. § 552a(d)(1) (at 14a), and by H.R. No. 95-793, 95th Congress, 1st Session. The District Court gave no reasons for refusing the translation and and untranslated copy of the document.

allegations of fact in the Complaint as being true, in an appeal from an order granting a motion to dismiss the Complaint. E.g., United States v. New Wrinkle, Inc., 342 U.S. 371 (1952), Murray v. City of Milford, 380 F.2d 468 (2nd Cir. 1967), A.T. Brod & Co. v. Perlow, 375 F.2d 393 (2nd Cir. 1967), and Brown v. Brown, 368 F.2d 992 (9th Cir. 1966). And a Complaint should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which may be proved in support of the claim. Hudson v. Hardy, 11 FRServ2d 1298 (D.C.Cir. 1968), and Sass v. District of Columbia, 316 F.2d 366 (D.C.Cir. 1963).

In this lawsuit, White's allegation that Evans granted his request had to be accepted as true for the purpose of considering the OPM's motion to dismiss.

And the District Court was required to proceed immediately to a consideration of the legal issues presented. Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965). In this lawsuit, the legal issue is resolved by 5 U.S.C. § 552(a)(6)(C) which expressly required White's entire application record to have been made promptly available to him if Evans granted his request.

The OPM's denial of White's allegation that Evans granted his request, at the worst, raised an issue of fact. Certainly, Evans' testimony on the matter would be relevant to that issue. But, although the FOIA and the PA both place the burden on the OPM to sustain its refusal to give White access to the remaining parts of his application record, the OPM moved for dismissal without placing Evans' testimony

on the matter in the record. Indeed, the OPM moved for dismissal without offering or introducing any evidence whatsoever. White moved to compel discovery, including an interrogatory that, when answered, would have enabled him to locate employees and former employees of the OALJ, including Evans. But the denial of that motion (at 6a) and the dismissal of the Complaint allowed the OPM to win the lawsuit without sustaining its burden, and without giving White an opportunity to locate Evans and ascertain her position on the matter.

Assuming arguendo that Evans' letter was a partial denial of White's request (contrary to his position), her failure to comply with an important OPM rule precluded White from enumerating the withheld documents in the Complaint. In Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir. 1973), the

Court of Appeals said, "In a large document it is vital that the agency specify in detail which portions of the document are disclosable and which are allegedly exempt." Rosen was the executive director of the CSC and, as might be expected, the OPM has a rule that requires precisely that, 5 CFR § 297.303(c)(1). Nonetheless, and as indicated, Evans' reply did not describe materials claimed to be exempt. Therefore, White did the best he could by seeking in Count II to invoke his right under the PA to de novo judicial review, and by filing interrogatories that, when answered, would provide the necessary information. As in the case of locating Evans, the District Court's denial of White's motion to compel discovery precluded White from addressing the allegedly exempt materials document by document.

Since White was unable to address

those materials in the Complaint, and since the pertinent information was not supplied through answers to interrogatories, and since the District Court did not examine White's application record in camera, no court could possibly determine de novo from the litigation record whether White was given his full entitlement to access to his 2,000-page application record. 5/ Nonetheless, the District Court decided on the merits (at 11a) that the OPM applied Subsection (k)(5) properly.

That decision was premised on the OPM's claim, as noted by the District Court in its Order, that the OPM granted access to White's application record,

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5/ Part of White's claim is that too much information was redacted from certain parts of his application record, which claim cannot be decided without comparing White's redacted copies with the originals.

> . . . having deleted names and other identifying data from the evaluations under the authority of Exemptions 2, 6, and 7 of FOIA and Exemptions 5 and 6 of the Privacy Act. . . .

Conversely, that decision was not bottomed on any factual material in the litigation record from which the District Court could have determined, firsthand, whether or not the OPM had acted properly. The litigation record is virtually non-existent and is even less adequate than the one found by the Court of Appeals to be inadequate in Founding Church of Scientology v. National Security Agency, 610 F.2d 824 (D.C.Cir. 1979), at 830-833. 6/

6/ The District Court's finding that the OPM applied Subsection (k)(5) properly, pertains only to the evaluations of White, and there is no similar finding pertaining to other documents in the application record. Furthermore, the correspondence pertaining to White's prior requests for access to the application record are not in the litigation record and, therefore, the District Court had no factual basis for considering Evans' reply "in the (Footnote continued on next page.)

The OPM's redaction of information on the basis of FOIA exemptions was improper, additionally, because PA Subsection (q) prohibits agencies from withholding records on the basis of FOIA exemptions if the records are assessible under the PA. 7/ In other words, the OPM applied the wrong substantive standard, and the District Court had no way of knowing factually the extent to which information may have been redacted as a result of the application of FOIA exemptions.

6/ (Continuation of footnote.)

light of" prior requests (at 10a), or for concluding that the OPM's access policy was "consistent" (at 10a), which it was not.

7/ If the PA authorizes withholding, there is no need to determine whether the FOIA also authorizes withholding. And if the PA does not authorize withholding, an agency cannot withhold under an FOIA exemption. Therefore, an agency must look to the PA, and to the PA alone, when that statute is applicable.

Finally, during the course of the appeal, the OALJ changed its policy to disclose more information than was formerly disclosed to White. Specifically, the OALJ would not disclose handwritten information on the ground that the handwriting could be identified, and would not convert that handwriting to typewritten form on the ground that the OALJ was not required to do so. But, now, the OALJ will convert the handwriting, making more information available. White advised the Court of Appeals of the change of policy. But the Court of Appeals ignored such advice and, in applying Subsection (k)(5), relegated White to the lesser disclosure under the discarded OALJ policy.

In summary, the courts' actions denied White of his day in court. If Evans' reply granted White's request, the courts

ignored the clear mandate of the FOIA that his application record be made promptly available. And if Evans' reply denied White's request, the courts have decided the merits of the lawsuit against him without (1) requiring the OPM to carry its statutory burden, (2) giving White an opportunity to ascertain what parts of his application record were withheld, and why, and (3) giving White an opportunity to address the merits of the reasons for the withholdings. Such actions cry loudly for an exercise of this Court's power of supervision.

2. The Constitutional Question

The District Court and the Court of Appeals have decided on the merits that the OPM applied Subsection (k)(5) properly "to withhold the identities of the persons who were promised

confidentiality in providing evaluations of Plaintiff." Whether the courts are right or wrong, they have reached the challenge in Count III of the Complaint to the constitutionality or constitutional application of Subsection (k)(5) of the PA. They have said, in effect, that White cannot have greater access to his application record unless that statutory provision, authorizing the OALJ to withhold materials compiled to determine his eligibility for promotion to an ALJ position, is required to yield to the Constitution.

The constitutional question is premised on White's having a "liberty" or "property" interest that is protected by the due process clause of the Fifth Amendment to the Constitution. This Court identified such a protected "liberty" interest in Board of Regents v. Roth,

408 U.S. 564 (1972), stating, at 574,

> . . . The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner . . . that contravene/s/. . . Due Process," Schware v. Board of Bar Examiners, 353 U.S. 232, 238, and, specifically, in a manner that denies the right to a full prior hearing. Willner v. Committee on Character, 373 U.S. 96, 103. . . .

And in a companion case, Perry v. Sindermann, 408 U.S. 593 (1972), this Court also identified such a protected "property" interest in White's expectancy of continued employment, which is discussed at 603. Although this Court did not expressly address the matter, White maintains that his "property" interest includes his expectancy of a promotion to an ALJ position if his performance so warrants. 8/

Since one can be promoted to an ALJ position only if selected from a certificate

8/ In January 1981 White received an award from the FERC for superior performance.

prepared from a register that is established and maintained by the OALJ 9/, the OALJ regulates "eligibility for a type of professional employment" within the purview of Roth. The OALJ controls the entrance to the ALJ profession throughout the federal government, paralleling the function of the Board of Bar Examiners and the Committee on Character in Schware and Willner, respectively. 10/

Although this Court limited its statement in Roth (quoted at 27) to Fourteenth

9/ 5 U.S.C. § 3319(a) limits the selection of eligible candidates to those whose names appear on certificates prepared pursuant to 5 U.S.C. § 3317(a).

10/ The article entitled "Federal Administrative Law Judges: A Focus on Our Invisible Judiciary", 33 Admin. Law Review 109 (1981), discusses the importance of ALJs to many government agencies and departments, and states, at 112,

> . . . /T/he U.S. Civil Service Commission (now OPM) has been exclusively responsible for the initial examination, certification for selection, and compensation of ALJs.

Amendment due process at the state level of government, it was not excluding Fifth Amendment due process at the federal level of government. For Schware, which is cited therein, was an outgrowth of Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926), in which this Court said that the federal government must provide a hearing in regulating eligibility for the professional representation of others before the tribunal that is now the Tax Court.

If due process is required when determining whether an individual may enter the practice of law in a particular state (Schware and Willner), or practice accounting or law before a particular tribunal (Goldsmith), then due process should also be required when determining whether an individual may serve on a particular tribunal. White should have

the same opportunity to refute those who spoke against him, as the Justices of this Court had to refute those who may have spoken against them. And the first step is to obtain access to the statements against him.

In Willner, this Court held that one must be accorded procedural due process before being excluded from practicing law, and, further, 373 U.S., at 103, that procedural due process "requires confrontation and cross-examination of those whose word deprives a person of his livelihood." This Court added, at 105, that "Petitioner was clearly entitled to notice of and a hearing on the ground for his rejection. . . ."

So, too, the OALJ must provide a hearing before it can exclude an attorney from eligibility for promotion to an ALJ position, and the hearing must be one in which the applicant can confront and

cross-examine those whose word deprives him from a listing on the register of eligibles. The OALJ must also give the applicant access to the entire application record; otherwise, his right to confront and to cross-examine will be hollow.

The United States District Court for the District of Minnesota apparently was unaware of Roth when, two weeks later, it held in Norlander v. Schleck, 345 F.Supp. 595 (1972), consistent with Roth, that all persons have a right to procedural due process when being considered for placement on an eligible civil service list. That court concluded that the claimed need of the government for confidential treatment promised to references, was outweighed by the applicant's right to due process, stating, at 600, that

> . . . /T/he due process clause requires the source and substance of the references which are unsatisfactory be revealed so that they may be refuted if possible and a reasonable opportunity afforded so to do. . . .

Even the General Counsel of the CSC was troubled by the CSC's procedures when he said publicly on May 22, 1975 (34 Fed. Bar Journal 320, footnote omitted, emphasis added),

> . . . /T/he Commission has found itself in the unenviable position of maintaining that a person is unsuitable for Federal employment based on information it has developed, while at the same time refusing to disclose the source of that information. This approach, of course, offends the traditional judicial notions of due process which require, at a minimum, that an individual adversely affected by information be informed of its source and given the opportunity to examine, cross-examine, or otherwise impugn its veracity.
>
> * * *
>
> . . . Moreover, it is emphasized in the legislative history /of the PA/ that an individual is not precluded from knowing the substance and the source of confidential information when that information is used to deny him a promotion in a Government job. . . .

The General Counsel's reference to the "legislative history" includes, specifically, Congressman Erlenborn, who sponsored Subsection (k)(5).

The House version of the PA, which is the version that was finally enacted, did not originally permit the limited withholding of materials that is now embodied in Subsection (k)(5). It required full disclosure without exception. The CSC opposed full disclosure of rating and employment application records; but the limited type of disclosure which it advocated was rejected 22 to 11 by the Committee on Government Operations. On November 20, 1974, Congressman Erlenborn sponsored Subsection (k)(5) as a floor amendment, which was debated and adopted by a 192 to 177 vote. During the course of that debate he explained his amendment (at 36657 Cong. Rec.), as follows:

> Only to the extent that the confidential source would be compromised would we keep the name of the individual who is the confidential source or such information as would identify him from the applicant. That information would be kept from the individual seeking information. Otherwise, all the rest of the contents of the file, including any of this derogatory information, would be made available to the jobseeker.

The Senate conferees were not happy with Subsection (k)(5). And, as a result, when a compromise conference bill emerged for floor voting on December 18, 1974, the "Analysis of House and Senate Compromise Amendments to the Federal Privacy Act" (which substituted for a conference report) stated (at 40881 Cong. Rec.):

> The compromise provision for the maintenance of information received from confidential sources represents an acceptance of the House language after receiving an assurance that in no instance would that language deprive an individual from knowing of the existence of any information maintained in a record about him which was received from a "confidential source." The agencies would not be able to claim that disclosure of even a small part of a particular item would reveal the

identity of a confidential source. . . .

> Furthermore, the acceptance of this section in no way precludes an individual from knowing the substance and source of confidential information, should that information be used to deny him a promotion in a government job. . . . [Emphasis added.]

On December 18, 1974, when the compromise bill was considered by the House, Congressman Erlenborn answered a question of Congressman Alexander, as follows (at 40884 Cong. Rec.):

> Mr. ALEXANDER. Let me ask the gentleman one further question. Suppose an individual believed that he had not been promoted in his Government job because of confidential derogatory information in his file, and that the Government refused to allow the individual access to that information on the grounds that allowing access would reveal the identity of the confidential source. Suppose further that the individual then went to court and demanded that he be promoted, arguing that nothing on the public record interfered with his right to the promotion. Would the Government then have to let him see the portion of his file which it had previously withheld?
>
> Mr. ERLENBORN. If the Government wanted to introduce the statement into evidence

> in court, it would surely have to allow the individual to see the statement. If the Government had no other reason for denying the promotion, it would in effect have two choices: Release the information which would reveal the identity of the confidential source or lose the case. /Emphasis added./

In other words, the sponsor of Subsection (k)(5) and the substitute for a conference report said that access would prevail over confidentiality in the matter of promotions in government jobs. Both intended Subsection (k)(5) to be administered in a manner that is consistent with the due process concept of a confrontory hearing that has been mandated by this Court in connection with regulating eligibility for professional employment. And both said, consistent with Willner, that the language used in Subsection (k)(5) is intended to allow job applicants to have an opportunity to confront and refute those word would deprive them of a livelihood.

The OALJ is not administering Subsection (k)(5) in that manner. The OPM does not provide confrontory hearings -- or any hearings, for that matter -- for dissatisfied candidates for ALJ positions. 11/ The OPM has implemented

11/ Subsequent to the Court of Appeals' denial of rehearing and rehearing en banc herein, White received from the OPM a copy of a memorandum dated April 3, 1979, from Evans, as Acting Director of the OALJ, to the then Director of the OPM, pertaining to appeals from OALJ rating actions.

In the past, such appeals were considered by the Appeals Review Board of the CSC, which was abolished by the Civil Service Reform Act of 1978. As a result, the newly formed OPM had to consider how to handle such appeals, and one possible alternative was to delegate jurisdiction to decide such appeals to the newly formed Merit Systems Protection Board (MSPB). In recommending against that alternative, Evans said in her memorandum of April 3, 1979 (emphasis added):

> . . . The Appeals Review Board of the Civil Service Commission decided ALJ examination appeals on the record without hearing. There is a

Subsection (k)(5) in a manner that allows the OALJ to withhold from such candidates the substance and source of information that is used by the OALJ to rate them ineligible for such positions. The OPM's refusal to provide such hearings, and the OALJ's withholding of such information, go hand in hand; both are repugnant to the constitutional right of candidates for

11/ (Continuation of footnote.)

> question as to whether or not all appeals to the MSPB are required to be processed under Section 7701 procedures which provide opportunity for an adversary hearing and it is entirely possible that the MSPB will decide that it must hear all appeals under this statutory provision. If it does, persons contesting their examination ratings would be entitled to the full array of procedural rights provided by Section 7701. These appeals do not involve fundamental constitutional rights and, for obvious reasons, are ill suited to be conducted in an adversary setting.

Today, the alternatives adopted do not provide for hearings, as in the past.

ALJ positions, under Willner and Roth, to refute any adverse information about them, if they are able to do so. And both are repugnant to the due process clause of the Fifth Amendment.

In summary, Subsection (k)(5) allows agencies to withhold from candidates for professional positions the source and substance of information used to determine their eligibility for such positions, contrary to this Court's holdings in Willner and Roth that such candidates have a constitutional right to an adversary hearing on their eligibility, including full access to adverse information. The intent of Congress, that Subsection (k)(5) cannot be used to withhold the source and substance of information used to determine eligibility for promotion in government employment, can be implemented through a holding that

Subsection (k)(5) may not be constitutionally applied in such a situation. If the intermediate decisions of ALJs are to become the final decisions of government agencies and departments, and of the courts upon review, then candidates for the "invisible judiciary" should be qualified in a manner that is consistent with the Constitution.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and orders of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

ALAN J. WHITE
8201 Snug Hill Lane
Potomac, MD 20854
Petitioner, in propria persona

APPENDIX

[Filed July 29, 1981]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 80-2349 and 80-2436 — September Term, 1980
Civil Act. No. 80-1059

Alan J. White,
Appellant
v.

Office of Personnel Management, et al.

BEFORE: Wright, Wilkey and Mikva, Circuit Judges

O R D E R

On consideration of appellant's petition for rehearing, filed July 9, 1981, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

BY:
Robert A. Bonner
Chief Deputy Clerk

/Filed July 29, 1981/

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 80-2349 and 80-2436 — September Term, 1980
Civil Act. No. 80-1059

Alan J. White,
Appellant
v.

Office of Personnel Management, et al.

BEFORE: Robinson, Chief Judge, Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

O R D E R

Appellant's suggestion for rehearing en banc has been circulated to the full Court and no judge of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

BY:
Robert A. Bonner
Chief Deputy Clerk

/Filed June 29, 1981/

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 80-2349 and 80-2436 — September Term, 1980
Civil Act. No. 80-1059

ALAN J. WHITE,
Appellant

v.

OFFICE OF PERSONNEL MANAGEMENT, et al.

Appeals from the United States District Court for the District of Columbia.

Before: WRIGHT, WILKEY, and MIKVA, Circuit Judges.

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and briefs were filed herein by the parties. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. See Local Rule 13(c).

This court is in agreement with the result reached by the District Court, generally for the reasons stated in its order filed October 16, 1980. See Appellant's Appendix at 86.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby

affirmed.

Per Curiam

For the Court

George A. Fisher
Clerk

/Filed November 5, 1980/

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN J. WHITE, Plaintiff	:	
v.	:	CIVIL
OFFICE OF PERSONNEL MANAGEMENT, et al., Defendants	:	ACTION 80-1059

ORDER

Upon consideration of Plaintiff's Motion to Alter or Amend Judgment, Motion for Leave to File Appended Supplemental Memorandum in Support of Motion to Alter or Amend Judgment, Plaintiff's Motion to Compel Discovery, Plaintiff's Motion for Findings, Notice of Partial Withdrawal of Motions, Plaintiff's Notice of Appeal and Request for Expedition, and the entire record herein, the Court notes that (1) the above captioned case was dismissed with prejudice by this Court's Order dated October 16, 1980; (2) no new facts or legal arguments presented by Plaintiff justify vacating this Court's Order of Dismissal. It is therefore by the Court this 5th day of November, 1980,

ORDERED, that Plaintiff's Motion to Alter or Amend Judgment in the above captioned case be and hereby is DENIED; and it is

FURTHER ORDERED, that Plaintiff's Motion for Leave to File Appended Supplemental Memorandum in Support of Motion to Alter or Amend Judgment be and hereby is

DENIED; and it is

FURTHER ORDERED, that Plaintiff's Motion to Compel Discovery be and hereby is DENIED; and it is

FURTHER ORDERED, that Plaintiff's Motion for Findings be and hereby is DENIED.

*Aubrey E. Robinson, Jr.
United States District Judge

/Filed October 16, 1980/

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN J. WHITE, Plaintiff	:	
v.	:	CIVIL ACTION
OFFICE OF PERSONNEL MANAGEMENT, et al., Defendants	:	NO. 80-1059

ORDER

Upon consideration of Plaintiff's Motion for Partial Judgment on the Pleadings, Defendant's Motion to Dismiss, Plaintiff's Motion to Strike and for a More Definite Statement, Defendant's Opposition thereto, and the entire record herein, the Court notes that (1) Plaintiff seeks judicial review of an adverse determination made by the Office of Personnel Management (OPM) on Plaintiff's requests under the Freedom of Information Act (FOIA) and Privacy Act for access to certain materials relating to his 1975

and 1976 Administrative Law Judge application files, including unredacted evaluations of Plaintiff provided by persons under a pledge of confidentiality; (2) Defendant OPM has granted access to the files and all of the evaluations of Plaintiff it received in connection with Plaintiff's 1975 and 1976 applications, having deleted names and other identifying data from the evaluations under the authority of Exemptions 2, 6, and 7 of FOIA and Exemptions 5 and 6 of the Privacy Act; (3) exemption (k)(5) of the Privacy Act (5 U.S.C. § 552a) provides for the withholding of

> investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment,... but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence,...;

(4) one of the documents furnished to Plaintiff by OPM pursuant to his FOIA request was a list of persons who had been asked to evaluate Plaintiff; (5) withhout challenging the applicability of Exemption 5 to the evaluations in his application file, Plaintiff now contends that (a) OPM waived the protection of the exemption by providing Plaintiff the list of persons evaluating him, thus revealing "the identify of a source" and (b) OPM cannot rely on the exemption since it failed to raise it when responding to Plaintiff's most recent request for access to his entire application file; (6) an unintentional or unauthorized "leak" of exempt material does not waive the protection of the exemption Safeway Stores, Inc. v. Federal Trade Commission, 428 F.Supp 346 (D.D.C. 1977); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th

Cir. 1975); (7) the fact that Plaintiff was furnished a list of names of his evaluators is therefore not controlling in the instant case; (8) the purpose of the exemption is to protect the identity and privacy of the individual providing information to the agency in its evaluation process; (9) this purpose will be served by denying Plaintiff access to unredacted evaluations since Plaintiff will still be precluded from connecting particular evaluations and comments to particular names from the list of sources previously disclosed to Plaintiff; (10) the most recent grant of access to Plaintiff's application file, in which OPM failed to raise any exemption, must be considered in light of (a) the number of Plaintiff's requests for access dating back to 1976 and (b) OPM's consistent policy of granting access to the requested materials while

deleting from the materials released names and identifying data that would reveal the source providing the information under a pledge of confidentiality; (11) OPM's failure to once again raise the exemption does not constitute a waiver herein, and (12) Defendant properly applied the Exemption 5 of the Privacy Act to withhold the identities of the persons who were promised confidentiality in providing evaluations of Plaintiff. It is therefore by the Court this 16th day of October, 1980,

ORDERED, that Defendant's Motion to Dismiss be granted; and it is

FURTHER ORDERED, that Plaintiff's Motion for Partial Judgment on the Pleadings, and Plaintiff's Motion to Strike and for a More Definite Statement be and hereby is denied; and it is

FURTHER ORDERED, that Plaintiff's

complaint be dismissed with prejudice.

Aubrey E. Robinson, Jr.
United States District Judge

FREEDOM OF INFORMATION ACT

5 U.S.C. § 552

(a)(4)(B) On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo . . . and the burden is on the agency to sustain its action.

(a)(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall --

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination. . . .

(a)(6)(C) . . . Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. . . .

PRIVACY ACT OF 1974

5 U.S.C. § 552a

(d) ACCESS TO RECORDS. -- Each agency that maintains a system of records shall --

(1) upon request by any individual to gain access to his record . . . permit him . . . to review the record and have a copy made of all or any portion thereof in a form comprehensible to him. . . .

(g)(1) CIVIL REMEDIES. -- Whenever any agency . . .

(B) refuses to comply with an individual request under subsection (d)(1) of this section . . .

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(g)(3)

(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo . . . and the burden is on the agency to sustain its action.

(k) SPECIFIC EXEMPTIONS. -- The head of any agency may promulgate rules . . . to exempt any system of records within the agency from subsections . . . (d) . . . of this section if the system of records is --

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

(q) EFFECT OF OTHER LAWS. -- No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise assessible to such individual under the provisions of this section.

OPM REGULATIONS

5 CFR § 297

297.205 Denials of access requests.
(a) If an access request is denied, the system manager or designee shall give the requester the following information:

* * *

(3) The reasons for the denial, including citation of appropriate sections of the Act and this part; and
(4) The individual's opportunities for further administrative consideration, including the name, position title, and address of the OPM official responsible for the review. . . .

297.303 Response to access requests.

* * *

(c) Denial of access. Where it is necessary for the system manager or designee to deny access to all or any part of the requested record, the decision must be based on one of the reasons for denial set forth in § 297.205 of Subpart B of this part. In addition to providing the requested [sic., required?] information about the denial which is prescribed by § 297.205(a) of this part, the Office [of Personnel Management] or agency official claiming an exemption from the access provisions of the Privacy Act will:
(1) Inform the requester when any portion of the record is exempt and, where appropriate, clearly describe any material in the record that is exempt in its entirety, in such a manner that will enable the requester to know of the existence of such material and to

be able to sufficiently describe it in any request for review of the decision exempting [sic., withholding?] it; and

(2) Inform the requester of the basis for any denial and his or her right to appeal the decision to exempt [sic., withhold?] any part or all of the requested record, . . . in the case of an OPM denial, to the General Counsel, Office of Personnel Management, 1900 E Street, N.W., Washington, D.C. 20415.